



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Lewis Machine & Tool Co.

File: B-272069

Date: September 6, 1996

Alan M. Grayson, Esq., and Victor A. Kubli, Esq., Law Offices of Alan M. Grayson, for the protester.

Daniel C. Sauls, Esq., Jerald S. Howe, Jr., Esq., and Paul R. Hurst, Steptoe & Johnson, for United Defense Limited Partnership, an intervenor.

Richard A. Couch, Esq., and Vera Meza, Esq., Department of the Army, for the agency.

Adam Vodraska, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Under a solicitation for a prototype lightweight howitzer, the protester's proposal, premised on a prototype developed and fabricated by an Army arsenal and provided under a subcontract to the protester, could not be accepted because the subcontract was not authorized by 10 U.S.C. § 2208(j), which permits subcontracting by arsenals only where they can compete directly under the solicitation with private firms, which this solicitation did not permit.

DECISION

Lewis Machine & Tool Co. protests the decision by the Army Tank-Automotive and Armaments Command, Armament Research, Development and Engineering Center, Picatinny Arsenal, New Jersey, to eliminate Lewis from the competition under request for proposals (RFP) No. DAAE30-96-R-0003 for a contract to participate in the "shoot-off" phase of the development of a lightweight 155 millimeter (mm) howitzer. This RFP contemplated the award of fixed-priced contracts to all acceptable offerors for the "shoot-off," the first phase in the acquisition of a lightweight 155 mm howitzer to replace aging and heavier howitzers currently in use by the Army and Marine Corps.

We deny the protest.

The RFP required offerors to deliver a single prototype howitzer, as well as related equipment, technical and other specified documentation, and a support team, to Yuma Proving Ground in Arizona by April 25, 1996. Agency personnel then performed an initial screening of the proposed howitzers for compliance with the

criteria listed in the RFP and reviewed the acceptability of the submitted technical and other specified documentation. All offerors whose howitzers passed the initial screening were awarded firm, fixed-price contracts in the amount of \$500,000 to participate in the "shoot-off" between the competing prototype howitzers. The "shoot-off" is a 6-month long period of developmental tests and operational assessments at several Army and Marine Corps sites, during which agency personnel test, evaluate, and compare the features and attributes of the howitzers which passed the initial screening. During the "shoot-off," each offeror is responsible for training agency personnel in the operation and maintenance of its howitzer, and for responding to government technical inquiries. Offerors are also responsible for providing technical support and engineering, spare parts, and maintenance, and for shipping the howitzers from test site to test site.

For the next phase of this procurement, the Army will use the results of the "shoot-off" together with the evaluations of proposals submitted by the competitors to select a contractor for the Engineering and Manufacturing Development (EMD) phase of the project. The EMD contractor is to supply eight test article howitzers, based on the successful prototype used at the "shoot-off," at specified intervals for further tests to validate engineering changes and manufacturing technologies. The EMD contract will also contain options for subsequent large-scale production of the howitzer.

The Arsenal Statute, 10 U.S.C. § 4532 (1994), requires the Army to make its supplies in government-owned factories or arsenals if economical. See Action Mfg. Co., B-220013, Nov. 12, 1985, 85-2 CPD ¶ 537; B-143232, Dec. 15, 1960. Under current Army procedures, the Army determines prior to issuing a solicitation whether it is more economical to "make" the needed item utilizing in-house manufacturing capacity or to "buy" the item from private industry.¹

Here, the solicitation contemplated the purchase of the howitzer from private industry, which has produced prototypes based on previous development efforts, and did not contemplate that arsenals could compete with private firms for the contracts; none of the standard provisions announcing that arsenals could compete as a prime contractor were included in the RFP. In this regard, where the Army makes a "buy" determination, the Army procedures generally preclude Army

¹These procedures are found in a June 6, 1995, draft regulation issued by the Commander, Army Materiel Command, prescribing policies, responsibilities, and procedures for implementing a July 20, 1992, policy statement from the Office of the Assistant Secretary of the Army on the implementation of statutory authorities for manufacturing by Army industrial facilities.

industrial facilities, such as arsenals, from competing with private industry under the resulting solicitation.²

Following the Army's issuance of a draft RFP in June 1995, the Rock Island Arsenal (RIA) requested the contracting activity to amend the solicitation to allow offerors to utilize RIA as a subcontractor. RIA is a working capital-funded Army industrial facility that has produced various artillery systems, and operates an extensive artillery manufacturing facility with related technological capabilities and the necessary skilled personnel. The contracting activity previously provided funding to RIA to help develop a new recoil technology for the howitzer program, and, after the draft RFP was issued RIA expressed interest in producing the weapon or its components. RIA's representatives state that they discussed the possibility of subcontracting with several large defense firms expected to compete for the contract. Those firms had committed to proposing other prototypes, but expressed interest in subcontracting with RIA for components or services at a later date if selected for the EMD contract. RIA proceeded to fabricate a technology demonstrator, which became RIA's lightweight 155 mm howitzer prototype; RIA's representatives state that RIA developed the prototype to showcase the new recoil technology, which the contracting activity intended to make available to the winner of the competition.

An amended draft RFP issued on January 12, 1996, informed offerors that RIA was "allowed to sell items as a subcontractor to industry" and that a solicitation provision prohibiting contractor personnel from supervising or directing government personnel did not prohibit a prime contractor/subcontractor relationship between industry and a government-owned and operated facility such as an arsenal. RIA then requested that the solicitation include the following provision:

"This solicitation is open to competition between Department of Defense [DOD] activities and private firms for subcontracting pursuant to 10 U.S.C. § 2208(j), and all other applicable statutes and regulations."

The final version of the RFP was issued on April 10, 1996, but inadvertently omitted the solicitation provision requested by RIA.

Meanwhile, Lewis--a small business defense contractor located near RIA, which was cognizant of the procurement effort--learned that RIA was completing its prototype.

²Army industrial facilities may be allowed to participate in a solicitation where it is unclear whether it is economical to have the work performed in-house or where a solicitation involves requirements that are not appropriate for a "make" decision, but present substantial subcontracting opportunities for Army facilities.

Lewis has weapons manufacturing experience with such items as artillery components, grenade launchers, and small arms. At the time, Lewis was subcontracting work to RIA through the Manufacturing Technology Consortium, an organization associated with RIA, which is involved in local business development, training and technical assistance, including the utilization of excess capacity at RIA's manufacturing and engineering facilities. Lewis was aware that the solicitation prevented RIA from directly entering its prototype in the "shoot-off," but suggested to RIA that Lewis enter the competition as the prime contractor using RIA's prototype. Although Lewis would not have been able to enter the competition without using the RIA prototype, Lewis claims to be capable of developing and fabricating the prototypes required for the EMD phase of the contract based on the RIA design, as well as eventually proceeding to full scale production of the gun, with subcontracting as needed.

Following discussions with RIA representatives, Lewis submitted a proposal to RIA on April 16 through the Manufacturing Technology Consortium outlining how Lewis would enter the competition for the lightweight 155 mm howitzer using RIA's prototype. RIA officials considered Lewis's proposal beneficial to RIA because its prototype would be entered in the "shoot-off" competition and, if successful, result in future work for the arsenal. RIA officials also considered the arrangement permissible under the solicitation because Lewis would be acting as the prime contractor, which RIA was precluded from doing, and because they expected the RFP to be amended to include the RIA-requested solicitation provision permitting subcontracting with DOD activities such as RIA.

On April 18, the contracting activity amended the final RFP to add the subcontracting provision requested by RIA to the RFP's executive summary.

RIA drafted a subcontract, which specified that Lewis, pursuant to 10 U.S.C. § 2208(j), had requested to team with RIA, whereby RIA agreed to provide its prototype howitzer for Lewis's use during the "shoot-off" and Lewis agreed to assume the cost of transporting the gun to Yuma Proving Ground as well as engineering support provided by RIA. The subcontract provided that Lewis shall have the sole and exclusive right to perform the functions of project management and systems integration to the extent RIA has the right to grant, and that the United States has the right to purchase any of Lewis's design changes or technical improvements. Despite being named a "Contract of Sale" and referring to Lewis as the "Buyer" and RIA (representing the United States) as the "Seller", the subcontract did not transfer ownership of the prototype to Lewis; rather, the United States continues to possess all rights, title, interest, and license to the prototype. The subcontract also provided that Lewis and RIA would continue the teaming arrangement if the RIA prototype was selected for award. The subcontract was approved by the head of the RIA-based Army Industrial Operations Command,

reviewed by Lewis's attorney, and signed by Lewis and a contracting officer for RIA on April 19.

Lewis entered the RIA prototype in the competition as Lewis's proposed howitzer, which was delivered to Yuma Proving Ground in time for the April 25 commencement of the "shoot-off," along with the required equipment, documentation, and support team.

After consulting with other Army officials and with the approval of the head of the contracting activity, the contracting officer eliminated Lewis from the competition on May 10 on the basis that:

"[RIA's] efforts are of such [a] substantial nature that [RIA is] in effect the prime contractor under the proposal [Lewis] submitted for this effort. This is not in compliance with the provision allowing [DOD] activities to compete for subcontracts."

In this regard, the Army asserts that besides supplying the actual prototype howitzer and equipment, RIA also provided personnel for Lewis's support team, and was primarily responsible for preparing the technical and other required documentation. The Army explains that in doing so, RIA circumvented the statutory requirements governing such agreements, as well as the Army's own internal policy procedures restricting Army industrial facilities from competing directly with private firms where, as here, the competition for the prime contract(s) to be awarded under the solicitation is not open to participation by DOD activities.

Lewis protested to our Office that the Army improperly eliminated it from the competition for doing exactly what the RFP permitted, namely subcontracting with a DOD activity pursuant to 10 U.S.C. § 2208(j).

We find that, notwithstanding the inclusion in the RFP of the solicitation provision expressly allowing for subcontracting with DOD activities pursuant to 10 U.S.C. § 2208(j), Lewis's subcontract with RIA was not authorized by that statute, which provides:

"The Secretary of a military department may authorize a working capital funded industrial facility of that department to manufacture or remanufacture articles and sell these articles, as well as manufacturing or remanufacturing services provided by such facilities, to persons outside the [DOD] if--

- (1) the person purchasing the article or service is fulfilling a [DOD] contract; and

(2) the [DOD] solicitation for such contract is open to competition between [DOD] activities and private firms."

In implementing 10 U.S.C. § 2208(j), the Army's policy statement (noted above) states that:

"[b]y its terms, [10 U.S.C. § 2208(j)] requires that only [DOD] contracts awarded through public/private competition can be open to subcontracting by Army industrial facilities. When a competition is open to public facilities, it is thus also open for possible subcontracting under [10 U.S.C. § 2208(j)]."

Likewise, the Army's draft regulation (noted above) provides that an arsenal's authorization to compete with private industry for subcontract awards is subject to the requirement that "[t]he DOD prime contract must have been open to competition from both public and private entities."

It is undisputed that the RFP here was not open to competition between DOD activities and private firms, such that an Army arsenal could compete directly with private firms for the prime contract(s) to be awarded under the RFP. The plain language of 10 U.S.C. § 2208(j), as confirmed by the implementing Army policy and procedures, precluded the Army from opening the competition to DOD activities for subcontracting since the solicitation was not open to competition between DOD activities and private firms for the prime contract(s).³ Lewis's proposal was premised upon its subcontract with RIA; Lewis could not and did not allege that it could or would offer a howitzer from an alternate source for the "shoot-off." Thus, the acceptance of Lewis's proposal would have been inconsistent with 10 U.S.C. § 2208(j). Under the circumstance, Lewis's elimination from the competition was required, since its proposal was premised upon the improper RIA subcontract.⁴

³Counsel for the contracting activity now concedes that it probably did not have the authority to include the RIA-requested solicitation provision.

⁴The protester has not cited, nor have we have found, any other appropriate authority for this subcontract, which specified only 10 U.S.C. § 2208(j) as the authority on which it was based. In requesting the solicitation provision allowing subcontracting under the authority of 10 U.S.C. § 2208(j), RIA noted that without that solicitation provision, subcontracting would have to be in accordance with 10 U.S.C. § 4543 (1994), which authorizes Army industrial facilities to sell manufactured articles or services outside DOD under certain conditions which neither the record nor the protester indicate were or could be met in this case. The subcontract with Lewis is apparently the first time RIA has subcontracted under 10 U.S.C. § 2208(j).

See Energy Compression Research Corp., B-243650.2, Nov. 18, 1991, 91-2 CPD ¶ 466, aff'd, B-243650.3, May 11, 1992, 92-1 CPD ¶ 432 (awardee's proposal premised on use of Federally Funded Research and Development Center (FFRDC) should have been rejected as contrary to prohibition against FFRDCs competing with private firms).

Nevertheless, Lewis asserts that its proposal should be accepted because Lewis relied upon the solicitation provision permitting subcontracting with DOD activities, as well as on assurances from RIA that the subcontract was legal, in submitting a proposal under the RFP premised upon the RIA prototype.⁵ However, the improper inclusion in the solicitation of the provision permitting subcontracting with DOD activities provides no basis to accept Lewis's proposal because the government is neither bound nor estopped by the actions of its officers or agents "in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit." Utah Power & Light Co. v. United States, 243 U.S. 389, 409 (1917). Further, offerors for government contracts are deemed to have constructive notice of the contents of the United States Code, and anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his

⁵Lewis also claims to have relied on RFP provisions which permitted offerors to rely on the government for some or all of the background intellectual property for their prototypes as well as on Government Furnished Equipment (GFE). These provisions do not themselves authorize subcontracting with arsenals, but recognize, as indicated in the record, that prototypes may have been developed through authorized licensing or cooperative research and development agreements with the government and that proposals could be based on the use of the GFE listed in the RFP.

authority. Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380, 384 (1947); Trapper Mining Inc. v. Lujan, 923 F.2d 774, 781 (10th Cir. 1991), cert. denied, 502 U.S. 821 (1991); see Mine Safety Appliance Co., B-242379.5, Aug. 6, 1992, 92-2 CPD ¶ 76 (note 4); R.B.S., Inc., B-194941, Aug. 27, 1979, 79-2 CPD ¶ 156, aff'd, B-194941, Oct. 12, 1979, 79-2 CPD ¶ 249. Thus, notwithstanding the unauthorized solicitation provision permitting subcontracting with DOD activities, there is no basis to contract on the basis of a proposal premised on such a subcontract, where, as here, the subcontract is inconsistent with an applicable statute. See Honeywell Info. Sys., Inc., 56 Comp. Gen. 167 (1976), 76-2 CPD ¶ 475.⁶

The protest is denied.

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of the United States

⁶As noted, the Arsenal Statute requires the Army to make supplies in government-owned factories or arsenals if economical. See B-143232, supra. The record before us shows that RIA operates an extensive artillery manufacturing facility and has developed a prototype howitzer that may satisfy the Army's requirements. However, the record contains no evidence that the contracting activity determined, in deciding to "buy" the weapon from private industry, that developing and manufacturing the weapon in government-owned factories or arsenals--such as RIA--could not be done on an economical basis. In such an analysis, the costs of the government factory or arsenal must be evaluated on an "out-of-pocket" basis. Action Mfg. Co., supra. By separate letter, we are bringing this matter to the attention of the Secretary of the Army for whatever action he deems appropriate.